

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 210 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE M.H.KADRI

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

SHIRISHBHAI PARIKH

Versus

STATE OF GUJARAT .

Appearance:

MR D D VYAS, ADVOCATE, FOR THE APPELLANT.

MR S R DIVETIA, ADDL.P.P. FOR THE RESPONDENT-STATE.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI
Date of decision: 24/07/96

ORAL JUDGEMENT (per PANCHAL, J.)

By means of filing this appeal under S.374 of the

Code of Criminal Procedure, 1973, the appellant has challenged legality and validity of judgment and order dated February 21, 1991, rendered by the learned Sessions Judge, Valsad at Navsari in Sessions Case No. 53 of 1989, convicting him under Ss.8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act' for short) and sentencing him to R.I. for 10 years as well as fine of Rs.1.0 lac, in default R.I. for 6 months.

2. The prosecution case in brief is that Pramodkumar Shivbahadur was discharging duties as Unarmed Police Constable at Railway Police Station, Valsad. On April 5, 1989, he had reported for duty at Railway Police Station, Valsad, and had thereafter gone to railway station. At Railway Station, other police personnel including Head Constable Ramchandra Raghav were also on duty. Head Constable Ramchandra Raghav asked Pramodkumar to go to Vapi for serving summons on Dineshchandra Lalbhai against whom II CR No.54/89 for the offence punishable under S.279 was registered at railway police station, Valsad. In compliance of the oral instructions given by Head Constable Ramchandra Raghav, unarmed Police Constable Pramodkumar boarded 16 UP train and went to Vapi. Dineshchandra Lalbhai was plying tempo on rent and therefore, Pramodkumar made inquiries about Dineshchandra at cross-roads, G.I.D.C., Vapi. However, Pramodkumar could not find Dineshchandra Lalbhai. Therefore, he returned to Vapi Railway Station for the purpose of boarding train for Valsad. When Pramodkumar went to Platform No.2, he found a person with a cloth bag sitting on a bench kept at the platform. Unarmed police constable Pramodkumar suspected that the person sitting on the bench with cloth bag had liquor or other intoxicant contrary to the provisions of the Bombay Prohibition Act. He, therefore, made inquiries about the contents of the bag. The person who had cloth bag could not give satisfactory reply. He therefore, asked the person to open the bag. A plastic bag was taken out from the cloth bag and it was smelling intensely. Unarmed police constable Pramodkumar thought that the contents of the plastic bag could be narcotic substance. In the meanwhile, Sayaji Nagari train going to Valsad halted on Platform no.1. Unarmed police constable Pramodkumar made the person who had cloth bag to sit with him in the train which was going to Valsad. The person with the cloth bag, i.e. the appellant was brought to Valsad Railway Station. Thereafter, the said person was brought to police chowky situated at platform no.1, and the person with the bag was presented by unarmed police constable Pramodkumar before Head Constable Ramchandra Raghav. Head Constable Ramchandra Raghav summoned two panch

witnesses. On opening the cloth bag in the presence of panch witnesses, it was found to contain 3 plastic bags. One of the plastic bags was opened and it was found that it was containing heroin. Two samples, each of 25 gms. were drawn from the said packet, packed and sealed in the presence of panch witnesses. Thereafter unarmed police constable Pramodkumar gave his complaint in writing before Head Constable Ramchandra Raghav, which was entered in the register kept at railway police station, Valsad. It may be mentioned that Mr.S.K.Patel, who was then discharging duties as PSI, Valsad Railway Police Station, was on leave on April 5, 1989. When Mr.Patel reported for duty on April 6, 1989, Police Head Constable Ramchandra Raghav, handed over the investigation to him. Mr.Patel recorded statements of witnesses, and thereafter handed over the investigation to Mr.Raval, who was then discharging duties as Police Inspector, LCB, Western Railways. Mr.Patel also sent two samples for analysis. Report of Senior Scientific Assistant, Forensic Science Laboratory-cum-Assistant Chemical Examiner to Government of Gujarat, Ahmedabad, indicated that the contents of the samples were Diacetyl morphine (heroin). Mr.Raval thereafter, on completion of investigation submitted charge-sheet against the appellant under Ss.8 and 21 of the Act, and it was numbered as Sessions Case No.53 of 1989. The learned Sessions Judge, Valsad at Navsari framed charge against the appellant at Ex.1, under Ss.8 and 21 of the Act. The appellant pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution examined following witnesses in order to prove its case against the appellant :

- (1) Pramodkumar Shivbahadur PW 1 Ex. 12,
- (2) Vazirbhai Amirbhai PW 2 Ex. 16,
- (3) Somabhai Kalubhai Patel PW 3 Ex. 22,
- (4) Pravinsinh Amarsinh Raval PW 4 Ex. 23,
- (5) Ramchandra Raghav Patil PW 5 Ex. 24,

Prosecution also relied on documentary evidence such as complaint filed by unarmed Police Constable Pramodkumar Shivbahadur which was produced at Ex. 13, panchnama Ex. 17, report of Analyst produced at Ex. 16, etc. to prove its case against the appellant.

3. After recording of evidence of prosecution witnesses was over, the learned Judge recorded statement of the appellant under S.313 of the Criminal Procedure Code. In his statement under S.313, the appellant stated that the case against him was false. He claimed that he was made to sit in the train bound for Valsad, against his wish but he had no bag at all. He stressed that the

bag was produced by the complainant, i.e. unarmed police constable Pramodkumar. He asserted that in his presence, no panchnama indicating seizure of any narcotic drug was prepared and he had no bag worth the name. The appellant, however, did not examine any witness in his defence.

4. On appreciation of evidence led by the prosecution, the learned Judge recorded following conclusions :

- (i) The evidence of unarmed police constable Pramodkumar indicates that on April 5, 1989, he had gone to Vapi and had found the appellant with a bag at Platform No.2;
- (ii) The evidence of unarmed police constable Pramodkumar read with evidence of panch witness Vazirbhai Amirbhai and Head Constable Ramchandra Raghav Patil, indicates that the cloth bag carried by the appellant was searched in presence of panchas, and heroin weighing 1 Kg. was found from a plastic bag which was kept in the cloth bag;
- (iii) The report of the Analyst shows beyond doubt that the substance analysed was heroin ;
- (iv) In view of the large quantity of narcotic drug found from possession of the appellant, the defence to the effect that narcotic drug was planted cannot be accepted ;
- (v) The appellant had no pass or permit authorising him to possess heroin ;

5. In view of the above referred to conclusions, the learned Judge convicted the appellant under Ss.8 and 21 of the Act and imposed sentence which is referred to earlier, giving rise to the present appeal.

6. Mr.D.D.Vyas, learned Counsel for the appellant has taken us through the entire evidence on record. On behalf of the appellant, it was submitted that there are inherent improbabilities in the evidence of prosecution witnesses and therefore, the impugned judgment deserves to be set aside. It was emphasised that evidence of unarmed police constable Pramodkumar does not indicate that the cloth bag which was produced before the court as muddamal article no.1 was carried by the appellant on April 5, 1989 from which one plastic bag containing

heroin was found and therefore, the conviction deserves to be set aside. After drawing the attention of the court to paragraph 14 of the sworn testimony of unarmed police constable Pramodkumar as well as paragraph 4 of the deposition of panch witness Vazirbhai Amirbhai, it was asserted that no panchnama was prepared in the presence of those witnesses, nor heroin was seized from possession of the appellant and therefore, the appeal should be allowed. It was submitted that the learned Sessions Judge failed to notice inconsistencies and discrepancies appearing in the evidence of prosecution witnesses and therefore, the appeal should be accepted.

7. Mr.S.R.Divetia, learned Counsel for the Respondent submitted that cogent and convincing reasons have been given by the learned Sessions Judge while convicting the appellant under Ss.8 and 21 of the Act, and the court should not interfere with the finding of facts which are based on appreciation of evidence of prosecution witnesses. It was stressed on behalf of the respondent that though there is minor inconsistency in the evidence of the prosecution witnesses regarding colour of cloth bag which was found from the possession of the appellant, the same being inconsequential, should not be attached much weight. The learned Counsel for the State Government contended that the fact that the appellant was in possession of heroin contrary to the provisions of the Act is amply proved by the evidence of unarmed police constable Pramodkumar as well as by the evidence of panch witness Vazirbhai Amirbhai and Head Constable Ramchandra Patil and therefore, the appeal should be dismissed.

8. The submission that the appellant was never brought to Valsad Railway Station cannot be accepted. Evidence of unarmed police constable Pramodkumar clearly indicates that on instructions of Head Constable Ramchandra Patil, he had gone to Vapi for the purpose of serving summons to Dineshchandra Lalbhai, who was involved in an offence under S.279. Even in his statement under S.313, the appellant stated before the court that he was made to sit in the train bound for Valsad against his wish, and was brought to Valsad. The say of unarmed police constable Pramodkumar that he had brought the appellant from Vapi railway station to Valsad railway station is also corroborated by the contents of his complaint which is produced at Ex. 13. On the facts and in the circumstances of the case, we are of the opinion that the learned Sessions Judge has not committed any error in coming to the conclusion that the appellant was brought from Vapi railway station to Valsad railway

station. This finding recorded by the learned Sessions Judge is based on evidence and no ground is made out on behalf of the appellant to interfere with the said finding of fact.

9. However, the material question which arises for consideration of the court is whether the appellant was found in possession of narcotic drug on April 5, 1989, in contravention of the provisions of the Act ? Evidence of unarmed police constable Pramodkumar indicates that on April 5, 1989, he had gone to Vapi to serve summons to one Dineshchandra Lalbhai, but the summons could not be served as Dineshchandra Lalbhai was not available. This witness has stated before the court that when he returned to Vapi railway station for boarding train going to Valsad, he went to Platform No.2, and there he found the appellant with a bag sitting on a bench. The witness has deposed before the court that on suspicion the bag was opened and another plastic bag was found from the said cloth bag. The witness claimed that intense smell was coming out of the packet, and he suspected that the contents might be narcotic substance, and therefore, he made the appellant to sit with him in the train bound for Valsad. The witness also claimed that the appellant with bag was produced by him before Head Constable Ramchandra Raghav, who summoned two panch witnesses, and in the presence of panch witnesses, heroin was seized from possession of the appellant. In cross-examination, the witness has stated that though he had got the cloth bag opened, plastic bags kept therein were not taken out. He stated in his cross-examination that it was not ascertained at Vapi railway station that the content of the plastic bag was heroin. He admitted that in his complaint Ex. 13, it was stated that on verification, the plastic bag was found to contain brown sugar. Again in para 6 of his deposition, the witness asserted that the fact that the content of plastic bag was heroin was verified at Vapi railway station in presence of others though no writing was executed nor names of those who were present, were noted down. In paragraph 5 of his deposition, the witness asserted that the cloth bag from which plastic bag was found, had red stripes. He also asserted that if the cloth bag which was recovered from the appellant had no red stripes, then it was not the same bag which was seized from the appellant. He further stated in cross-examination that no time was mentioned in his complaint which he had given before Head Constable Ramchandra Patil. In paragraph 14 of his deposition, the witness clearly admitted that he had not participated in preparation of panchnama.

10. It is relevant to note that the cloth bag which was allegedly recovered from the appellant was produced by the prosecution before the trial court as muddamal article no.1. The description of it clearly indicates that it had no stripes whatsoever. Thus, this star witness of the prosecution has failed to identify the cloth bag which was allegedly carried by the appellant on April 5, 1989. As noted earlier, in paragraph 5 of his deposition, the witness has stated that the plastic bags kept in the cloth bag were not taken out, and it was not ascertained as to whether the contents of the plastic bags was heroin, whereas later on he has asserted that it was ascertained at Vapi railway station in presence of other persons that the contents of one of the plastic bags kept in the cloth bag was heroin. Though this witness has, in no uncertain terms, stated that he had not participated in the preparation of panchnama, he stands completely contradicted by his complaint on this point wherein it is specifically stated that he was all throughout present when panchnama was prepared. As admitted by this witness, the regular halt of trains going towards Valsad was at Platform No.1. But he has not given any explanation as to why he had gone to Platform no.2 of Vapi railway station. Though he has stated that the fact that one of the plastic bags contained heroin was verified in presence of others, he did not note down names of those who were present nor made any writing. It has come in evidence that at Vapi Railway Station, there is a police station. This witness has not offered any explanation as to why the appellant was not taken before authorised officer at Vapi Railway Station after he was satisfied that one of the plastic bags contained heroin. Witness Pramodkumar asserted before the court that by smelling the substance, he had satisfied himself that the plastic bag kept in white cloth bag contained heroin. However, report of the analyst does not indicate that the substance examined had any smell. It is doubtful whether one can identify a substance to be heroin on smelling it. As observed earlier, unarmed police constable Pramodkumar has disowned panchnama by stating that he had not participated in the preparation of the panchnama at all. On overall view of his evidence, we are of the opinion that this witness has no regard for truth, nor his conduct is satisfactory, and it is risky to base conviction on such evidence.

11. Again, identity of the cloth bag which was allegedly carried by the appellant on April 5, 1989 is not established either by the evidence of panch witness Vazirbhai Amirbhai, or by the evidence of Head Constable

Ramchandra Patil. Though in initial part of his deposition, panch Vazirbhai has supported prosecution regarding seizure of heroin from possession of the appellant, in the later part of his evidence, panch witness Vazirbhai, has clearly admitted that no bag having white stripes was seen at the time when he had signed the panchnama. While the testimony of this witness was being recorded, he was confronted with cloth bag produced by the prosecution as muddamal article no.1. On seeing the cloth bag, the witness deposed that the cloth bag with white stripes which was shown to him was never searched. He further asserted in his evidence that no packets were taken out from the cloth bag having white stripes. Though in the panchnama, there is mention that one white cloth bag was seized, the witness stated before the court that he had no knowledge whether the white cloth bag was seized by police or not. He clearly stated before the court that while seizing muddamal cloth bag, signatures of panch witnesses were never obtained. In no uncertain terms, the witness testified before the court that he was not in a position to state with certainty whether the bag which was shown to him during his examination-in-chief was the same which was seized from the appellant. It is relevant to note that while discussing the evidence of panch witness, the learned Sessions Judge has not referred to this part of the deposition of the panch witness at all. In fact, the learned Judge failed to take into notice material part of the deposition of panch witness Vazirbhai Amirbhai. In our view, the evidence of panch witness does not go to show that in his presence any white cloth bag containing three plastic packets was found from possession of the appellant. It is relevant to note that though this witness had made damaging statements during his cross-examination, it was not thought fit by the prosecution to treat him as a hostile witness. As the witness is not treated hostile, it would be legitimate to presume that the prosecution wants the court to believe his evidence. If the evidence of the panch witness is accepted, it becomes highly doubtful whether in fact muddamal article no.1 which is a white cloth bag, was ever seized from the possession of the appellant on April 5, 1989.

12. Evidence of Head Constable Ramchandra Patil also indicates that the appellant had a white cloth bag with him. He does not refer to any bag having stripes. In the panchnama also there is reference that the appellant had a white cloth bag in his hand. Evidence of panch witness Vazirbhai Amirbhai would go to show that he was not present at the time when white bag allegedly carried

by the appellant was searched. On the facts and in the circumstances of the case, we are of the view that Head Constable Ramchandra Patil had not kept present respectable persons when search of the bag being carried by the appellant, was made. Head Constable Ramchandra Patil in paragraph 15 of his deposition stated that he was not knowing the two panchas at all, nor had seen them on railway station, nor had verified their antecedents. Without ascertaining the antecedents, Head Constable Ramchandra Patil could not have concluded that the panch witnesses were respectable inhabitants of the locality in which the cloth bag of the appellant was to be searched. His assertion that he was not knowing any of the panch witnesses does not inspire confidence because panch witness Vazirbhai Amirbhai has clearly stated that he has 3 to 4 stalls at Valsad railway station, whereas another panch Jitendra is hawking a hand-larri at Valsad railway station. Witness Vazirbhai has further stated that his stalls are remaining open day and night, and he is doing business since years. He has also testified that he comes in contact with railway police. He has also deposed that earlier he had acted as panch in Criminal Case No. 7544/86 which was tried by the learned JMFC (Railways), Surat. In fact reading the deposition of Head Constable Ramchandra Patil, as a whole, it becomes abundantly clear that he is a liar and has no regard for truth. It is apparent that he deliberately selected panch witnesses and deposed before the court that heroin was recovered from one of the plastic bags which was kept by the appellant in white cloth bag. The conduct of Head Constable Ramchandra Patil also deserves to be deprecated. It was none of his business to depute unarmed police constable Pramodkumar to go to Vapi for informing accused Dineshchandra Lalbhai about the fact that charge-sheet was going to be submitted against him in court. Witness Pramodkumar has clearly admitted that no summons was required to be served on Dineshchandra Lalbhai, but he was merely to be informed that charge-sheet was to be filed against him. The law does not require a Police Officer to inform an accused that charge-sheet against him is going to be submitted in the court. After investigation, a report as postulated by S.173 of the Code is to be submitted in the court, and the procedure thereafter to be followed by the court has been laid down in the Code elaborately. Therefore, we do not think it prudent to rely on the evidence of this witness for the purpose of coming to the conclusion that the appellant was found in possession of heroin on April 5, 1989. As noted earlier, the learned Sessions Judge has failed to notice material part of depositions of the witnesses examined by prosecution. On overall view of

the evidence led by the prosecution, we are of the opinion that the prosecution has failed to prove the fact that the appellant was found in possession of heroin on April 5, 1989, in contravention of the provisions of the Act, and therefore, the appeal will have to be allowed.

13. For the foregoing reasons, the appeal succeeds. Judgment and order dated February 21, 1991, passed by the learned Sessions Judge, Valsad at Navsari, in Sessions Case No. 53 of 1989, convicting the appellant under Ss.8 and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and sentencing him to R.I. for 10 years as well as fine of Rs.1.0 lac, in default R.I. for 6 months, are hereby set aside and quashed. The appellant is acquitted of the offences with which he was charged. Fine if paid be refunded to him. The respondent is directed to release the appellant immediately unless required with reference to any other case. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

abraham*